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No. 123

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

BERNARD H. DANIEL, PETITIONER,

V.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

E. H. Gamble,
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Attorney for Petitioner.

Sam Mandell,
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None of the cases cited by the Government as authority for the proposition that self-serving statements made by a defendant out of court, explaining suspicious circumstances, may be proved against him, are applicable in this case for two reasons. All of those cases deal with prosecutions where the defendant was actually charged with a commission of a crime and not an attempt to commit a crime.

Secondly, in all of those cases the defendant or someone for him took the stand and testified. Neither of

those conditions exist in this prosecution. The petitioner was charged merely with an attempt to commit a crime, and did not take the stand in his own behalf, nor did he offer any testimony at the second trial. (Case 1210, page 10). The Government admits (Footnote 4, page 8) that if the statements complained of by us were false, then an inference arises from which is drawn another inference, leading to belief in the guilt of the defendant. The Government says that if the petitioner made a false statement regarding the destination of his first load of liquor, then it follows that his statements concerning the destination of the load of liquor in his car at the time of his arrest were also false, and that it therefore follows that the petitioner, at some place beyond that point in the road where he was apprehended, would turn to his right and enter the state of Kansas. The fact that the Government rests its case on the presumption which it draws from the evidence complained of, demonstrates how necessary it is to build inference on inference in order to arrive at the guilt of the petitioner.

The Government lays great stress on its statement, which was the statement of the trial court, that the petitioner was not on a direct route between East St. Louis and Houston, Texas when arrested. It is obvious that the Honorable Judge Otis was not familiar with our Missouri roads, nor was the Eighth Circuit. The most direct route from St. Louis to Houston is via U. S. 66 from St. Louis, Missouri to Carthage, Missouri where it joins U. S. 71 which leads to Houston. However, anyone who has ever traveled U. S. 66 from St. Louis to Carthage knows that it traverses the Ozark region of Missouri and that the road twists tortuously almost every foot of the distance between those two towns. Anyone familiar with the Missouri roads knows that both U. S. Highways 40 and 50 lead directly from St. Louis to U. S. Highway

71 over straight roads, and that time can be conserved by taking those highways to reach 71, and we who write this brief have traveled those highways and state that such are the facts.

When arrested Mr. Daniel was about twenty miles east of the Kansas state line and was proceeding in a southerly direction, not toward Kansas. He was suspected of an attempt to commit a crime, and he was charged with attempting to commit a crime, and was convicted on the mere suspicion that he was about to commit a crime.

We all know what it means to be suspected of attempting to commit a crime in Nazi Germany. What does it mean in America? What price does a man pay who is under suspicion of an attempt to commit a misdemeanor, such as Mr. Daniel stands charged with, a misdemeanor which applies to only three out of forty-eight states?

Mr. Daniel was arrested and compelled to stand trial.

His Oldsmobile coupe, worth not less than $500.00, and the whiskey worth about $225.00, were confiscated.

He was found guilty and sentenced to six months imprisonment and a fine of $500.00.

Mr. Daniel is a railroad engineer with twenty years service and seniority. He is now working about fourteen hours of each twenty-four-hour day, being employed by the Santa Fe. If his conviction stands he will be dismissed by the railroad and will lose all of the benefits accruing to him under the railroad retirement act.

Will the Government exact such a penalty because a man is under mere suspicion of an attempt to commit a misdemeanor? Is this the American freedom we are fighting for?

Nowhere in its brief does the Government justify the failure of the Eighth Circuit to pass on the competency of the testimony we challenged. Nowhere in its brief does the Government contend that the courts should not pass on the competency of evidence merely because a jury has been waived. Nowhere in its brief does the Government contend that it is not of general importance that a ruling be had from this Court touching the duties of trial courts and the reception of evidence where juries are waived. Nowhere in its brief does the Government offer any authority against our contention that the record does not sustain a conviction because there was no proof by the Government that the liquor in Mr. Daniel's possession was not accompanied by a permit. Nor is this complaint of ours an after-thought, as the Government's brief would seem to indicate. The exact point was raised and briefed before the Eighth Circuit which failed to rule on the point or even mention it in its opinion.

For all of the foregoing reasons and because we firmly believe that Mr. Daniel is innocent, that he was convicted through the reception of incompetent and prejudicial testimony and because his conviction is not supported by the record but is based entirely on inference built on inference, we respectfully urge and pray that the writ be granted.

Respectfully submitted,

E. H. Gamble,
Attorney for Petitioner.

Sam Mandell,
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of Counsel.